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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-733

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner,
v.
ALBERT TYRONE ALLENSWORTH,
Respondent.

OBJECTIONS TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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Now comes Leonard Townsend, Attorney for the Respondent, Albert Tyrone Allensworth, and prays that the petition for a writ of certiorari heretofore filed by William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan to review the judgment of the Supreme Court of the State of Michigan entered in the above entitled cause on August 29th, 1977, be denied.

QUESTION PRESENTED FOR REVIEW

Is a Defendant in a criminal case denied his Sixth Amendment Right to a trial by jury when the trial judge directs that jury that certain facts are established and they need not deliberate the issue?

OPINIONS BELOW

The Opinion of the Michigan Supreme Court is reported at 257 NW2d 81 (1977).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

The Fourteenth Amendment to the United States Constitution provides:

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Respondent accepts Petitioner's Statement of Facts.

ARGUMENT OPPOSING GRANTING THE WRIT

At the conclusion of the People's case, Defendants, Allensworth and Brown, rested without presenting a defense. A criminal defendant has no burden of going forward with the evidence and need not present a defense. In any criminal case as in the instant case when a defendant elects to proceed to trial he is presumed innocent and an issue of fact then exists. He need not take the stand to defend himself nor in any way contest the evidence presented against him. If he does not take the stand or present evidence, his election not to do so cannot in any way be used against him. The Court cannot comment on his silence nor can the Court state that certain facts are established and relieve the state of its burden of proof.

Defendant Allensworth's attorney did argue that his client was present at 2900 W. Boston but that he did not participate in any killing there. The defense was therefore the credibility of the witnesses and an erroneous identification.

The Court at the conclusion of the proofs instructed the jury as follows:

> "There is agreement here among all the parties about the fact that there was a robbery or attempted robbery in the apartment of Charles Dexter at 2900 West Boston Boulevard, and that in the accomplishment or attempted accomplishment of the robbery, William Thigpen was killed."

> "I instruct you, you may accept as a matter of fact, and there need be no deliberation on your part with respect to it, murder in the first degree was committed in killing of William Thigpen on April 13th, 1971 at 2900 W. Boston Boulevard, City of Detroit."

There was no objection by defense counsel to the Court's instruction.

The People rely on the fact that there was no objection to the charge and argue that the issue was therefore not preserved for appeal.

In *People* v *Reed*, 393 Mich 342, 349; 224 NW2d 867, 870 (1975), the Supreme Court held:

> "Once a plea of not guilty is entered, the defendant 'has an absolute right to a jury determination upon *all* essential elements of the offense. . . . Furthermore, in a situation wherein an *understandingly tendered waiver* is not forthcoming from the defendant, under no circumstances may the trial court usurp this right by ruling as a matter of law on an essential element of the crime charged'."

United States v *England*, 347 F2d 425, 430 (1965)

It is very interesting to note that both *Reed* and the instant case were tried by the same Judge. The purpose of an objection is to allow the judge an opportunity to correct any error by bringing the error to the Court's attention.

In *Reed*, counsel made a vigorous objection to the charge and was overruled by the Court. There is no reason to believe that an objection in the instant case would have brought a different ruling.

It is well settled that the Court must properly instruct the jury in the law whether or not a request to do so is made.

> *People* v *Liggett*,
> 378 Mich 706, 714;
> 148 NW2d 784, 788 (1967)

The People rely on the fact that defendant through his counsel denied his participation in the crime and argued that others must have committed it. They argue that defendant's denial means that he admits that a murder occurred but that he was not involved. It is true that in any case tried the defendant denies involvement. It does not follow that he is admitting that the crime was committed nor does he acknowledge the degree of the crime by his denial.

There was never agreement by any defendant that a murder was committed nor was there any request to so charge the jury. The Court was therefore in error when she said there was *agreement* among the parties. There was no such agreement.

The defendants in the instant case elected to exercise their Sixth Amendment right to trial by jury. The jury therefore must decide all issues of fact. *People* v *Liggett* The fact that there was no objection to the erroneous charge cannot be construed as an affirmative statement that no issue of fact existed. There is at most a failure of counsel to recognize the error. The defendant is entitled to a proper charge whether or not an objection is made.

The Michigan Supreme Court stated in *People* v *Reed*:

> "We find that the right of the jury to determine all elements of an offense is so fundamental a right that the harmless error rule is not appropriate where the judge invades

that province. There is a difference between commenting on the evidence and making a finding of fact for the jury. When the trial judge, as in the instant case, instructs that an essential element of a criminal offense exists, as a matter of law, we will find reversible error."

393 Mich 351; 224 NW2d 871

United States v *McKenzie*, 301 F2d 880, 882 (C.A. 6, 1962)

Schwacter v *United States*, 237 F2d 1640, 1644 (C.A. 6, 1956)

The People rely on *Horning* v *District of Columbia*, 254 US 135, 41 S. Ct. 53; 65 L. Ed. 185 (1920).

In that case the judge informed the jury that there was no question of fact and that if the law permitted it, he would instruct the jury to bring in a verdict of guilty. Respondent will not comment on the correctness of that ruling made fifty light years ago. Here however there are issues of fact. The very fact that a trial is held and the defendant is presumed innocent presented a question of fact for the jury. The jury therefore must decide all the issues except those stipulated as fact by all the parties. The judge in this case and in *Horning* had a duty to tell the jury what the law is and that the jury must then decide the facts. There were no admissions or stipulations of fact in the case at bar.

Respondent submits that once a defendant exercises his right to a trial by jury that all issues of fact must be decided by that jury. That it is error for the Court to instruct the jury that no issue of fact exists as to a material element in the case. That failure to object to an erroneous charge does not support that charge nor does it mean that defendant agrees with the conclusion of the Court that no uncontroverted facts exist.

Respondent submits that no issue is presented which requires plenary review by this Court.

CONCLUSION

It is respectfully submitted that for the reasons stated herein that petitioners request for a Writ of Certiorari should be denied.

Respectfully submitted.

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Dated: February 14, 1978.